



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 19th day of September, 1996

Served: Sept 19,

1996

Application of

UNITED AIR LINES, INC.

Docket OST-96-1618

**for renewal of frequencies under the
United States-Philippines Air Transport
Services Agreement (Route 2)**

Application of

NORTHWEST AIRLINES, INC.

Docket OST-96-1655

**for reallocation of frequencies under the
United States-Philippines Air Transport
Services Agreement (Route 2)**

ORDER RENEWING FREQUENCIES AND TO SHOW CAUSE

SUMMARY

By this order we renew seven of United Air Lines' allocation of ten weekly frequencies in the U.S.-Philippines market for a two-year period. In addition, we tentatively renew United Air Lines' allocation of the remaining three frequencies. We also permit Northwest to use temporarily three of United's frequencies through February 28, 1997, at which time United proposes to use them for a new all-cargo scheduled service.

BACKGROUND

U.S. Route 2 of the U.S.-Philippines Air Transport Agreement provides for scheduled service by designated U.S. carriers between any point in the United States and any

point in the Philippines. U.S. Route 2 rights historically have been limited to combination service only. Now, however, under amendments to the Agreement reached in a 1995 Protocol, U.S. carriers have the right to convert their Route 2 combination service frequencies into all-cargo frequencies (but not back again to combination). The United States can designate only three U.S. carriers for Route 2, and we have designated Continental Micronesia (CMI), Northwest Airlines and United. U.S. Route 2 carriers are limited to a total of 31 weekly frequencies. Those frequencies are allocated among the three designated carriers as follows: CMI-7, Northwest-14 and United-10.¹ CMI and Northwest are using all of their allocated frequencies, while United is using seven of its ten allocated frequencies.

We recently reallocated United's three unused frequencies to CMI to permit it to increase its four-times-a-week service between Honolulu and Guam via Manila to a daily service.² This temporary authority expires September 30, 1996. CMI, however, will not require these frequencies after this date because it was allocated three additional frequencies that became available under the U.S.-Philippine aviation agreement effective October 1, 1996. United had not objected to continued reallocation of the frequencies to CMI because it did not propose to use the flights before October 1996. Subsequently, United informed the Department that it does not intend to use the frequencies until March 1, 1997, because of delays encountered in converting passenger aircraft to all-cargo configuration to operate its proposed service.

The United States and the Philippines signed a Protocol in 1995 that increased the frequencies available to U.S. carriers from 31 to 36 frequencies on Route 2 during a phase-in period between 1997 and 2003. Effective October 1, 1997, U.S. carriers will have the right to operate two additional frequencies, for a total of 33 weekly frequencies (the frequencies increase to 34 weekly and 36 weekly frequencies effective October 1, 1998 and October 1, 1999, respectively). In addition to the all-cargo conversion right discussed above for Route 2, the Protocol also permits the United States to designate two additional carriers to provide all-cargo services on U.S. Route 3 of the Agreement.³

¹ CMI, Northwest and United hold certificate authority to serve the Philippines. See Orders: 95-1-41, 90-6-44 and 92-3-38, respectively. The frequency allocation of CMI was recently renewed and increased from four to seven flights since additional frequencies became available for regional service. See Notice of Action Taken, dated August 29, 1996, in Dockets OST 96-1165 and OST 96-1499. The frequency allocation of Northwest was recently renewed for fourteen frequencies. See Notice of Action Taken dated August 29, 1996, in Docket OST 96-1615. United's request to renew the frequency allocation that it was granted in Order 93-8-12 is pending in Docket OST-96-1618 and is at issue here. This allocation expired on September 30, 1996, but it continues in effect under the provisions of the Administrative Procedure Act, 5 U.S.C. 558(c), pending action on United's renewal application.

² See Order 96-5-37 and Notice of Action Taken dated August 29, 1996, in Docket OST 95-269.

³ U.S. Route 3 provides for scheduled all-cargo service between the United States, via intermediate points, and the Philippines, and beyond the Philippines. There are no frequency limitations on services operated under Route 3. Federal Express is currently the only U.S. carrier providing all-cargo service on Route 3. The Department has instituted the *U.S.-Philippine All-Cargo Service Proceeding* in

Docket OST-96-1074 to award the two new designations. Northwest is an applicant in that proceeding.

APPLICATIONS

United requests renewal of its allocation of ten weekly U.S.-Philippine frequencies. In support of its request, United states that it operates a daily combination flight between San Francisco and Manila via Seoul and that it previously operated three additional flights via Tokyo but ceased these flights due to the lack of operating slots in Japan; that United now plans to use the three frequencies to begin all-cargo flights between Anchorage and Manila via Osaka; that such service is consistent with the aviation agreements between the United States and both the Philippines and Japan; that it will provide valuable competition in markets where all-cargo service is limited by bilateral agreements; and that it has made arrangements to acquire DC-10 passenger aircraft and convert them to all-cargo configuration to begin service on March 1, 1997.

Northwest requests the permanent reallocation of the three unused frequencies allocated to United.⁴ In support of its request Northwest states that it proposes to operate all-cargo service between the United States and Manila via Tokyo and beyond Manila to Hong Kong with B-747F aircraft; that United has not used the frequencies for over two years and now proposes another seven-month delay while Northwest is prepared to use these valuable rights immediately; that the two additional frequencies available on October 1, 1997, could be allocated to United if its proposed services ever materialize and, in the meantime, Northwest can guarantee full use of the frequencies to serve the shipping public; and that consistent with Department policy, United should not be permitted to continue to hold three of the limited frequencies for such a long period and thereby waste valuable bilateral rights.

RESPONSIVE PLEADINGS

Northwest and United filed answers to each other's applications and several subsequent pleadings; Continental Micronesia filed a consolidated answer to both applications.⁵

United opposes the reallocation of its frequencies, arguing that it has plans to use them and has committed considerable funds toward preparation of the service, including the acquisition of aircraft; that Manila is an integral part of its broader plan to start an Asian all-cargo service (three weekly flights to Manila and three weekly flights to Taipei with both services operating via Japan); and that Northwest's objection and application are an attempt to preempt United's new service to preserve its dominant position in the Pacific. It further argues that its frequency allocation is not currently subject to a dormancy condition and that it based its plans to commence Philippine all-

⁴ Northwest states that it would return three frequencies at issue here if Northwest is awarded all-cargo authority on Route 3 in the *U.S.-Philippine All-Cargo Service Proceeding*.

⁵ CMI's answer was accompanied by a motion for leave to file an otherwise unauthorized document. Subsequent pleadings by United and Northwest were also accompanied by motions for leave to file. We will grant the motions.

cargo service on the assumption that it would be permitted to maintain the frequencies if it had plans to use them. In this regard, United argues that the existing record is inadequate, and thus, that an oral evidentiary hearing is required before the Department can reallocate United's frequencies on a permanent basis.

Northwest has no objection to renewal of the seven frequencies that United has consistently used but strongly objects to renewal of the three frequencies that have not been used for a lengthy period. It states that these frequencies should be awarded permanently to Northwest, arguing that based on reports in an industry newsletter, United is unlikely to have all the necessary aircraft available by March 1, 1997, to start its proposed service.⁶ Northwest states that United may once again have to delay its start-up date for some or all of its six weekly Pacific flights, and that contrary to United's allegation, Northwest's proposal to implement three flights immediately is a relevant consideration in the permanent allocation of these frequencies. Northwest further maintains that even if the current three frequencies are reallocated, United would have an early opportunity to be allocated two frequencies in October 1997, when additional frequencies become available under the 1995 Protocol.

United replied to Northwest, reiterating its plans to begin service March 1, 1997, and further arguing against Northwest's attempted reallocation. Northwest answered the reply reiterating its position that permanent reallocation of United's frequencies is warranted. United filed a further response further explaining its plans to commence service on March 1, 1997, and rejecting Northwest's arguments for permanent reallocation of its frequencies. Northwest filed a surreply questioning United's described aircraft arrangements for its proposed service and its commitment to commence service in the Asia market in March 1997.

CMI takes no position on whether the three frequencies are allocated to United or Northwest after September 30, 1996.⁷ It states, however, that it may want to use them to meet peak Christmas demand if they remain available in December.

Decision

After careful consideration, we have decided to renew United's allocation of seven weekly U.S.-Philippine frequencies. This action will be effective immediately and will continue in effect for a period of two years. We have tentatively decided to: (a) renew United's allocation of the remaining three weekly U.S.-Philippine frequencies, and (b) not to grant Northwest's request for permanent reallocation of those frequencies. We will, however, tentatively reallocate United's three weekly frequencies on a temporary

⁶ Northwest cites an August 1996 Avmark Newsletter which reports that United is having four DC-10 aircraft converted to all-cargo configuration by Aeronavali, two of which are scheduled to be completed by this year and the second pair to be completed in late 1997.

⁷ CMI did not oppose the applications as long as the Department promptly renewed and allocated CMI the three additional frequencies that became available on October 1, 1996. CMI's concern is now moot since we have granted CMI's applications. See footnote 1, *supra*.

basis to Northwest effective October 1, 1996, through February 28, 1997, and will reevaluate the circumstances at that time.

No party objects to renewal of United's seven weekly frequencies that it currently operates to provide scheduled combination services between San Francisco and Manila. In these circumstances and given that United is currently using those frequencies, we will renew its allocation for a period of two years, subject to our standard dormancy condition.

The objection to United's renewal application rests with United's three dormant frequencies. Northwest argues that United has permitted the frequencies to be dormant for too long a period and that its continued allocation of the frequencies wastes valuable bilateral rights. As we stated in Order 96-5-37, where an incumbent has held dormant route rights and another carrier seeks to use them, it has generally been our policy to permit the incumbent carrier to retain the rights provided that it has a reasonable plan to use them.⁸ While we are disappointed that United was not able to inaugurate its service on September 1, as originally planned, United has presented evidence in this case that it has firm and reasonable plans to begin all-cargo services in the U.S.-Philippine market. United has stated that it has made a commitment of \$38 million to purchase and reconfigure the aircraft for this service and has presented evidence that it is in possession of those aircraft and is in the process of converting them to all-cargo configuration. It has also fully described its plans for inaugurating U.S.-Asia all-cargo services including the subject Philippine operations in the Spring of 1997. Indeed, Northwest has acknowledged that United has a contract with Aeronavali to convert DC-10 aircraft for the proposed all-cargo services with some aircraft to be delivered before March 1997 and some in late 1997.⁹ United has also filed an affidavit confirming that sufficient converted aircraft to implement its Philippine proposal will be delivered before its proposed startup date.¹⁰ In these circumstances and taking into consideration the bilateral developments in the markets involved, we are not prepared at this time to reallocate United's frequencies to Northwest on a permanent basis.

That said, we recognize that the frequencies have been dormant for an extended period. These frequencies represent valuable operating rights that were obtained in exchange for rights for Philippine airlines. It is not our policy to permit such valuable rights to go unused indefinitely. Therefore, we propose to take two actions directed toward ensuring that these rights will not be wasted. First, we propose to require United to report to the Department on a monthly basis on its progress toward finalizing its plans to commence all-cargo services in March 1997. Such reports should include the status of (a) its delivery of converted aircraft for these services, and, if its aircraft plans change, the status of delivery of new aircraft, including any contracts relating to

⁸ Order 96-5-37 at 3.

⁹ September 4, 1996, Reply of Northwest at 3.

¹⁰ September 13, 1996, Reply of United at 2.

the acquisition/lease of aircraft for these services; (b) its ground handling arrangements and access to cargo facilities in the Philippines and Japan; and (c) its promotional plans including samples of promotional material, and OAG advertisements. These reports would begin in October 1996. They would be addressed to the Director, Office of International Aviation, filed no later than the 20th of each month in Docket OST-96-1618, and served on all parties to the docket. These reports will enable the Department to monitor United's progress toward implementing its services.

Second, we propose to allocate the three dormant United frequencies on a temporary basis to Northwest. The frequencies at issue would not be used by United until March 1997, a period of over five months, and Northwest has plans to use them in the near term. An award to Northwest would enable the carrier to operate its proposed all-cargo services during the peak winter season and for some time thereafter, and will ensure maximum use of the frequencies. While we recognize that Northwest sought permanent reallocation of the frequencies, we have proposed monthly reporting requirements on United to monitor its progress toward implementing its Philippine cargo service. Before March, we fully intend to review United's progress. If United cannot demonstrate at that time that it is prepared to commence service, then we will consider whether further extension of Northwest's operation of the frequencies is warranted, or whether we should institute procedures toward permanent reallocation of the frequencies.¹¹

We are unpersuaded by Northwest's argument that its earlier startup date calls for permanent reallocation of United's frequencies. We review each case where incumbent carriers hold dormant frequencies and other carriers seek to use them individually based on the circumstances affecting that particular situation. Consistent with that policy, we have tentatively concluded here that the circumstances warrant permitting United to retain its frequencies.¹²

Consistent with our standard practice, we intend to subject United's frequency renewal to our standard dormancy condition whereby the frequencies will automatically be

¹¹ While United has asserted that the Department cannot reallocate its frequencies without an oral evidentiary hearing, we find nothing in the statute or our regulations that requires oral evidentiary procedures in a case such as this one.

¹² Northwest cited several precedents in its behalf, specifically, cases involving South Africa, Russia, and the Philippines. We have reviewed the precedents and found each of them distinguishable. The South Africa case involved reallocation of frequencies from a carrier that no longer was an operating entity and thus could not provide any concrete plans for resumption of service. In the Russia case the frequencies had been dormant for nearly five years and involved services in a developmental market. Based on their service proposals, the incumbent carriers in that case retained the number of frequencies they were prepared to operate. The Philippine cases cited involved circumstances in which the frequencies were reallocated on a temporary basis and where the incumbent carrier had no plans to use them and did not object to the reallocation.

returned to the Department for reallocation if they are not used for a period of 90 days.¹³

¹³ See, *e.g.*, Orders 96-2-17, 96-6-12, 96-6-53, and the August 29, 1996, Notices of Action Taken renewing the U.S.-Philippine frequency allocations held by Northwest and Continental Micronesia (Dockets OST-96-1615 and 96-1499, respectively). The dormancy period would begin upon issuance of a final order in this proceeding with respect to the seven frequencies currently operated by United. It would begin March 1, 1997, with respect to the three currently dormant frequencies.

ACCORDINGLY,

1. We renew the allocation of seven weekly U.S.-Philippine frequencies to United Air Lines, Inc.;
2. The frequency renewal granted in ordering paragraph 1, above, is effective immediately and shall expire (a) September 30, 1998, or (b) the 90th day after United fails to use the frequencies unless the Department earlier suspends, modifies, or withdraws the frequency allocation;
3. We tentatively renew United's allocation of three additional weekly frequencies for services in the U.S.-Philippine market through September 30, 1998, subject to a 90-day dormancy condition beginning March 1, 1997;
4. We tentatively deny the application of Northwest Airlines, Inc., in Docket OST-96-1655, for permanent reallocation of three weekly U.S.-Philippine frequencies currently held by United Air Lines, Inc.;
5. We grant all motions for leave to file otherwise unauthorized documents in the captioned dockets;
6. We confirm the August 22, 1996, oral action of the Director, Office of International Aviation, establishing an accelerated procedural schedule for answers and replies in the captioned dockets;¹⁴
7. We tentatively reallocate on a temporary basis three U.S.-Philippine frequencies currently held by United Air Lines, Inc., to Northwest Airlines, Inc. through February 28, 1997, subject to our standard 90-day dormancy condition;
8. We tentatively require United Air Lines, Inc., to file a written report addressed to the Director, Office of International Aviation, as described in the text of this order, regarding its progress toward implementing its U.S.-Philippine all-cargo service;
9. We direct all interested persons to show cause why we should not issue an order making final our tentative findings and conclusions;
10. Any interested persons having objections to our tentative decisions as set forth in this order should file their objections with the Department's Docket Section (in the captioned dockets), 400 Seventh Street S.W., Room PL-401, Washington, D.C. 20590

¹⁴ United had opposed the shortened answer period to Northwest's application in Docket OST-96-1655. The answer period to Northwest's application was shortened by only five days. This meant that interested parties still had 10 days to formulate a response to the issues raised in Northwest's application. Further- more, many of those issues had been raised by Northwest earlier this year. Finally, United has filed supplements to its response which we are accepting here. In these circumstances, we do not find that United was prejudiced by the shortened answer period.

not later than ten calendar days from the date of service of this order; answers to objections shall be due seven calendar days thereafter;¹⁵

11. If timely and properly supported objections are filed, we will afford full consideration to the matters or issues raised by the objections before we take further action. If no objections are filed, we will deem all further procedural steps to have been waived and will proceed to enter a final order;¹⁶ and

12. We will serve this order on United Air Lines, Inc.; Northwest Airlines, Inc.; Continental Micronesia, Inc.; the Department of State (Office of Aviation Negotiations); and the Ambassador of the Philippines in Washington, D.C.

By:

CHARLES A. HUNNICUTT
Assistant Secretary for Aviation
and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at
<http://www.dotgov/dotinfo/general/orders/aviation.html>*

¹⁵ Parties should file an original and five copies of all objections and answers. All filings should be unbound and without tabs on 8½" X 11" white paper using dark ink (not green).

¹⁶ Since we have provided for objections to our tentative decision, we will not entertain petitions for reconsideration of this order.